



Comptroller General
of the United States

Washington, D.C. 20548

423311

Decision

Matter of: Tony's Fine Foods

File: B-254959.2; B-254961.2

Date: January 31, 1994

Richard D. Lieberman, Esq., and Jane B. Maxwell, Esq., Sullivan & Worcester, for the protester.
Hope B. Eastman, Esq., Paley, Rothman, Goldstein, Rosenberg & Cooper, for Eurpac Special Markets, and Gunther F. Ditzel, Service Deli, Inc., interested parties.
Jay B. Manning, Esq., Defense Commissary Agency, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that the procuring agency improperly evaluated quotes in small purchase procurements are denied where the record does not show that the agency failed to consider any reasonably available information in evaluating the offerors' past performance, the most important technical evaluation factor.
2. In negotiated, small purchase procurements leading to fixed-price contracts, the procuring agency is not required to conduct cost realism analyses where the solicitations did not provide for cost realism evaluations and adequate price competition was received.

DECISION

Tony's Fine Foods¹ protests the awards of blanket purchase agreements (BPA) to Eurpac Special Markets and Service Deli, Inc. under request for quotations (RFQ) Nos. DECA02-93-T-0033 (-0033) and DECA02-93-T-0034 (-0034), issued by the Defense Commissary Agency (DECA). Tony's argues that DECA's evaluation of Eurpac's and Service Deli's technical proposals was unreasonable; that DECA improperly did not evaluate the cost realism of the awardees' quotes; and that the solicitations' stated bases for evaluating price quotes for pizza were deficient.

¹Tony's was previously known as Tony Ingoglia Salami and Cheese Co., Inc.

We deny the protests in part and dismiss them in part.²

DECA conducted these procurements pursuant to the small purchase procedures of Federal Acquisition Regulation (FAR) Part 13.³ RFQ-0033 sought fixed-price quotes for the operation of in-store bakeries, delicatessens and pizza carts in base commissaries at various locations in the southwest United States, while RFQ-0034 sought quotes for the operation of in-store bakeries, delicatessens and pizza carts in base commissaries at various locations in the northwest United States.⁴ The bakery, delicatessen and pizza cart contractors are required to provide specified brand-name products for re-sale and the necessary personnel to operate the stores. The RFQs listed the equipment, facilities and supplies to be provided by the government.

Offerors were informed that the RFQs contemplated multiple awards and that awards would be made on a "best value" basis, with technical ability being substantially more important than price. The following technical ability subfactors were listed in descending order of importance:

1. Experience and past performance
2. Training and supervision
3. Service, selection and merchandising
4. Quality control

For each of the technical ability subfactors, the RFQs stated specific questions, the offerors' answers to which would form the basis of the offerors' technical proposals. For example, under the experience and past performance subfactor, offerors were required to answer the following:

"What experience does your company have in on-site, in-service bakery operations? What management controls will you use to ensure customer satisfaction? Provide sufficient

²A protective order was issued in this case, and counsel for Tony's and Eurpac were admitted under the protective order and received access to protected material. Our decision is based in part upon protected, confidential information and is necessarily general.

³The contracts of the incumbent contractor, AGS Foods, were terminated because it was debarred. These procurements are for interim contracts until the requirements can be reprocured.

⁴Not all of the locations will offer the complete combination of in-store bakeries, delicatessens and pizza carts.

evidence that identifies your company's ability to begin performance of the bakery/deli/pizza within the notification to proceed time frame?"

and, under the service, selection and merchandising subfactor, to answer the following:

"How will your operation of the bakery enhance service and selection for the customer? Will you use demos? Product sampling? Promotions? How will you enhance merchandise display?"

Offerors' proposed unit prices were solicited for a core list of identified bakery, delicatessen and pizza food products for each location. For example, the RFQs included a mandatory "deli price list" that required offerors to provide unit pricing for various brand-name, sandwich meats and cheeses. Offeror's proposed unit prices were required to remain firm for the first 3 months of performance. Thereafter, the offerors' price quotes would be negotiated with the contracting officer, but in any event the offerors must price their:

"bakery/deli/pizza products so that the commissary patrons realize a cost savings of at least 20 % of the commercial price of same or similar products in the local community."⁵

Fixed-price quotes and technical proposals were received from six firms, including Tony's, Eurpac and Service Deli, for each of the RFQs. The technical proposals for RFQ-0033 (southwestern region) were evaluated by a three person evaluation team, which scored the proposals for each technical ability subfactor as being either highly acceptable, acceptable or unacceptable. In addition, the evaluators identified evaluated proposal strengths and weaknesses for each subfactor. The technical proposals for RFQ-0034 (northwestern region) were evaluated by one evaluator, who scored the proposals as either acceptable or unacceptable.

Under RFQ-0033, the technical proposals of Tony's, Eurpac and Service Deli were considered technically equivalent but superior to the acceptable proposals of the other three

⁵Merchandise offered for sale at the bakeries, delicatessens, and pizza carts is purchased with appropriated funds from the Commissary Resale Stocks account of the Defense Base Operating Fund. Patrons purchase the food items at the price paid by the agency. The patron's purchase price of the food items is credited against the Commissary Resale Stocks account.

offerors. Since Tony's, Eurpac's and Service Deli's proposals were found to be technically equal, price for each location became the basis for award. Eurpac's and Service Deli's proposed prices were lower than Tony's pricing for each of the 16 southwest region locations solicited. DECA made awards to Service Deli for 15 locations and Eurpac for 1 location.

Under RFQ-0034, the technical proposals of Tony's, Eurpac, Service Deli and another offeror were determined to be acceptable while the proposals of the other two offerors were determined to be unacceptable. Eurpac's and Service Deli's proposed prices were lower than Tony's for each of the six northwest region locations solicited. DECA made awards to Eurpac for five locations and Service Deli for one location, based upon those firms' low priced quotes for those locations.

Tony's first protests that DECA's evaluation of Service Deli's and Eurpac's technical proposals was unreasonable. Specifically, Tony's complains that the agency did not consider (1) Service Deli's and Eurpac's alleged poor past performance at a number of locations in July and August 1993, as well as Service Deli's alleged poor performance at Elmendorff Air Force Base (AFB) in 1991; (2) that Service Deli and Eurpac lack their own facilities while allegedly only Tony's operates its own warehouses and transportation services; and (3) that Service Deli and Eurpac lack the number of personnel required to provide quality customer service.⁶

Small purchase procedures are designed to minimize administrative costs that might otherwise equal or exceed the cost of relatively inexpensive items or services. 10 U.S.C. § 2304(g)(1); FAR Part 13; General Metals Inc., 72 Comp. Gen. 54 (1992), 92-2 CPD ¶ 319. When using such procedures, an agency must conduct the procurement consistent with a concern for fair and equitable competition and must evaluate quotations in accordance with the terms of the solicitation. Tahoma Cos., Inc., B-253371, Sept. 14, 1993, 93-2 CPD ¶ 162. In reviewing protests against an

⁶On November 2, 1993, Tony's received the agency's report on its protests. On November 22, Tony's filed new protests (B-254959.3; B-254961.3), arguing that DECA did not evaluate proposals in accordance with the RFQ's stated best value evaluation scheme, but converted the procurements to a low-priced, technically acceptable offer basis for award. On November 24, we dismissed the new protests because they were not filed within 10 working days of the date that Tony's learned the bases of these protest allegations. 4 C.F.R. § 21.2(a)(2) (1993).

allegedly improper small purchase evaluation, we will examine the record to determine whether the agency met this standard and reasonably exercised its discretion. Id.

From our review of the record, we find that the agency's evaluation of Eurpac's, Service Deli's and Tony's technical proposals was reasonable. DECA evaluated Eurpac's and Service Deli's past performance as being highly acceptable under RFQ-0033 and acceptable under RFQ-0034. Specifically, Eurpac was determined to have an "excellent performance record" and Service Deli's "past performance indicate[d] success probability."

Tony's argues that DECA did not consider Eurpac's and Service Deli's performance problems at various locations in July and August 1993 or consider the Department of the Air Force's cancellation of Service Deli's BPA to provide bakery services at Elmendorff AFB, allegedly for non-performance in January 1991. DECA explains that on July 4, 1993, AGS Foods abandoned performance of commissary services at the locations identified by Tony's and that on July 5 awards for these services were made to Eurpac and Service Deli. The agency states that given the short lead times provided to the firms, they performed well during that period and have provided satisfactory performance thereafter. Regarding the alleged cancellation of Service Deli's BPA at Elmendorff AFB in 1991, DECA states that it did not operate the commissary at Elmendorff AFB in 1991 and that it has no information in its files indicating that Service Deli's contract at Elmendorff was terminated for non-performance as Tony's alleges.

While Tony's disagrees with DECA's assessment of Eurpac's and Service Deli's past performance, the record does not show that DECA failed to consider any reasonably available information in evaluating the proposals. See G. Marine Diesel, 68 Comp. Gen. 578 (1989), 89-2 CPD ¶ 101. Under the circumstances, DECA's evaluation of the awardees' past performance in this small purchase procurement was reasonable.

Tony's also argues that DECA should have downgraded Eurpac's and Service Deli's technical proposals under the service, selection and merchandising subfactor because neither awardee has its own warehousing and transportation capabilities, and each allegedly does not have sufficient personnel to perform the contract work. However, as indicated by the questions asked under this factor in the RFQs (quoted above), this factor did not provide for the evaluation of offerors' warehousing or transportation capabilities, or for the evaluation of the number of employees proposed for contract performance. Accordingly, Tony's challenge actually concerns the agency's affirmative

determination of Eurpac's and Service Deli's responsibility, which is a subjective determination that we will not challenge, absent a showing that the determination was made fraudulently or in bad faith, or that definitive responsibility criteria in the RFQs were not met. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. No such showing has been made here.

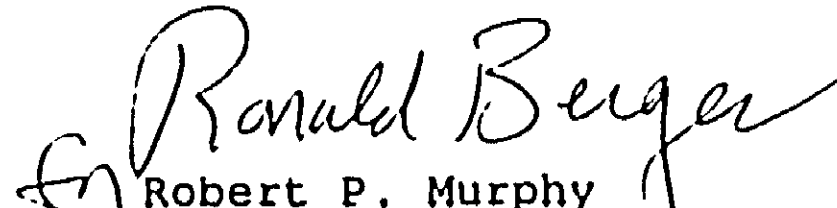
Tony's also complains that Service Deli failed to identify which brand name product it was quoting, as required by the RFQs. DECA contends that the RFQs required offerors to provide one of the stated brand names, so it made little difference whether the offeror identified the particular brand name to be ultimately provided. From our review of the record, we find that Tony's also did not identify which of the specified brand names it was quoting. Accordingly, we fail to see how Tony's was prejudiced in any way by Service Deli's failure to identify the brand name quoted.

Tony's also protests that DECA failed to evaluate the cost realism of Eurpac's and Service Deli's quotes. The RFQs, however, did not provide that the agency would evaluate the fixed-price quotes for realism. Where, as here, the solicitations do not provide for a cost realism analysis and adequate price competition has been obtained, the agency is not required to perform a cost analysis. See Contract Int'l Corp., B-246937, Dec. 20, 1991, 91-2 CPD ¶ 571, aff'd, B-246937.2, Feb. 5, 1992, 92-1 CPD ¶ 150. To the extent that Tony's contends that the RFQs should have provided for a cost realism evaluation, this concerns an apparent solicitation impropriety that was required to be protested prior to the closing time for receipt of quotes. 4 C.F.R. § 21.2(a)(1).

Finally, Tony's protests that the stated basis for evaluating offerors' price quotes for pizza was deficient. In this regard, Tony's contends that 8 days prior to the closing date for receipt of quotes it filed an agency-level protest challenging this aspect of the evaluation scheme. DECA denies that it received a pre-closing date, agency-level protest from Tony's. In any case, even assuming that Tony's filed an agency-level protest prior to the closing date for receipt of quotes challenging this matter, Tony's protest to our Office is untimely. Where a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action regarding that protest. 4 C.F.R. § 21.2(a)(3); Alpha Tech. Servs., Inc., B-250878, B-250878.2, Feb. 4, 1993, 93-1 CPD ¶ 104. Adverse agency action includes the agency's receipt of proposals. 4 C.F.R. § 21.0(f). Here, DECA's receipt of quotes on May 18, as scheduled, without responding to Tony's complaint about the

RFQs' evaluation scheme, constituted initial adverse agency action, Id. Accordingly, the 10 working day time period for filing a timely protest with our Office commenced on May 18, and Tony's protest of this issue filed in our Office on September 24 is untimely.

The protests are denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel